APPEAL NO. 010266

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 29, 2001. With regard to the issue before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the fourth compensable quarter.

The claimant appeals that decision, challenging the sufficiency of the evidence. The respondent (carrier) responds, objecting to consideration of the documents attached to the claimant's request for review sent to the Texas Workers' Compensation Commission, and otherwise urges affirmance.

DECISION

Affirmed.

The documents the claimant attaches to her request for review were not introduced into evidence at the CCH. We do not normally consider evidence submitted for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 980299, decided April 2, 1998; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The claimant had been employed as a flight attendant for (employer) when she sustained an injury on _____. The parties stipulated that the claimant sustained a compensable injury on _____; that the claimant has a 21% impairment rating; that impairment income benefits were not commuted; and that the qualifying period for the fourth quarter began on July 3, 2000, and ended on October 1, 2000. The fourth quarter in this case is subject to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)). The claimant initially proceeded on a total inability to work in any capacity theory.

Sections 408.142(a) and 408.143, and Rule 130.102 provide the statutory and regulatory requirements for entitlement to SIBs. At issue in this case is whether the claimant made the requisite good faith effort to obtain employment commensurate with her ability to work. The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(4) provides that the statutory good faith requirement may be met if the employee:

> (4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

At issue here is whether the claimant had an ability to work. Although the claimant testified to what she could or could not do, and in her opinion she was unable to do any work, the medical evidence is conflicting. The hearing officer determined that there were

other records showing the claimant did have an ability to work. The February 8, 2000, report of Dr. W, the claimant's treating doctor, references a functional capacity evaluation by another doctor which states that the claimant could do sedentary work with restrictions. Also, Dr. M stated in his June 28, 2000, report "that there probably are positions which the [claimant] could work." The hearing officer's findings that during the filing period for the fourth quarter there were records showing that the claimant did have an ability to work and that the claimant therefore did not comply with the requirements of Rule 130.102(d)(4) are supported by the evidence.

Alternatively, the claimant argues that she did in good faith look for work commensurate with her ability. The claimant went to the Texas Rehabilitation Commission for testing and claims she cooperated with the carrier's vocational service. Rule 130.102(d)(2), concerning full-time enrollment in a vocational rehabilitation program, does not apply because the claimant was never enrolled in any program full-time. The claimant also testified that she attended a two-hour class for modeling once a week so that she could learn to be a mature model. The claimant testified that the only employment she looked for was as a mature model. The carrier denied that the claimant cooperated with its vocational service and offered evidence that the claimant was provided some job leads that would allow her to work at home and set her own hours. The claimant admits she did not apply for the jobs. Those were all factors which the hearing officer could consider according to Rule 130.102(e).

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support this determination.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Robert W. Potts
Appeals Judge